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No. 75-432

In the

Supreme Court of the United States

OCTOBER TERM, 1975

JOHN C. GRECO,

Petitioner,

v.

ORANGE MEMORIAL HOSPITAL CORPORATION, ET AL,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the 5th Circuit (Appendix 1 of Petition) is reported at 513 F.2d 873 (5th Circuit 1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this cause is moot since Petitioner is no longer a member of the hospital medical staff and, consequently, is not entitled to the use of its facilities.

2. Whether in denying Petitioner the unqualified right to perform non-therapeutic abortions in Respondent's facility, Respondent was acting under color of State law so far as to confer federal jurisdiction under 42 U.S.C. 1983.

3. Whether the individual Respondents were correctly dismissed by the District Court for want of subject matter jurisdiction, there being no diversity of citizenship between the Plaintiff and Defendants.

4. Whether the Petitioner had the requisite standing to maintain this action.

STATUTE INVOLVED

42 U.S.C. 1983 printed in Appendix A.

STATEMENT

This case commenced in the District Court as a suit for declaratory judgment, the Petitioner contending that a hospital rule promulgated by Orange Memorial Hospital prohibiting the performance of non-therapeutic abortions was unconstitutional under the 14th Amendment to the Constitution of the United States and violated Title 42, U.S.C., Section 1983.

The Complaint also sought money damages from various members of the hospital's medical staff for conduct alleged to interfere with Petitioner's First Amendment rights and legitimate economic interests. The count for damages was dismissed by the District Court for lack of subject matter jurisdiction, since it plainly appeared from the allegations that this phase of the Complaint

was basically a personal tort claim and there was not complete diversity of citizenship between Petitioner and all of the Respondents.

The District Court proceeded to trial solely on the issue as to whether the hospital rule pertaining to abortions violated the Civil Rights Act or otherwise infringed upon Petitioner's Constitutional rights. This question was not reached, however, since the District Court concluded from the evidence that the hospital was not acting under color of state law with respect to said rule and, consequently, the Complaint was dismissed for want of federal jurisdiction.

Subsequent to the action of the District Court, an administrative hearing was held by the hospital on charges that Petitioner had violated a hospital surgical rule pertaining to entry into the peritoneal cavity of a patient without seeking the assistance of another surgeon as required by the rule. Pursuant to these proceedings, Petitioner was on February 21, 1975, dropped from the medical staff of the hospital.

ARGUMENT

I.

Whether this cause is moot since Petitioner is no longer a member of the hospital medical staff and, consequently, is not entitled to the use of its facilities.

As set forth in the affidavit of Willie C. Magness (Appendix B), Administrator of the Orange Memorial Hospital, Petitioner is no longer a member of the medical staff and would not be entitled to admit patients to the hospital for any surgical procedure including non-therapeutic abortions. Since the application for certiorari seeks to review the lower court's determination with regard to the

enforceability of a hospital rule prohibiting non-therapeutic abortions and seeks relief in the form of a declaratory judgment and injunction, this cause has become moot since any such action could not possibly afford any relief to Petitioner or his patients since he would not be permitted to use the hospital facilities for any purpose.

The granting of the application would, consequently, be futile and any action of the Court would constitute an advisory opinion.

II.

Was Respondent hospital acting under color of state law so as to confer federal jurisdiction under 42 U.S.C. 1983.

In BURTON VS. WILMINGTON PARKING AUTHORITY, 365 U.S. 715 (1961), this Court stated:

> "Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." 365 U.S. 715, 722.

This was the responsibility of the Dsitrict Court, which it discharged after hearing all of the evidence pertinent to the operation of the hospital. In an elaborate opinion containing its findings of fact and conclusions of law, the Court, "sifting facts and weighing circumstances" found that the evidence failed to establish that the hospital was acting under color of state law with respect to the rule and the enforcement thereof. See GRECO VS. ORANGE MEMORIAL HOSPITAL CORPORATION, 374 F. Supp. 227.

Unless clearly erroneous, this determination by the trial court should not be disturbed. Respondents, therefore, respectfully submit that this case does not present a question of national importance but is merely a case wherein Petitioner failed to carry his burden of proving facts sufficient to persuade the District Judge that he had jurisdiction to consider the constitutional claims.

But, even if the Court is authorized to make an independent determination of the facts presented by this record, Respondents respectfully submit that there was not that degree of state involvement sufficient to bring Respondents' actions within the ambit of the Civil Rights Act.

The problem is admitted a difficult one. However, other Courts which have considered it have concluded that the inquiry must be focused upon the existence or non-existence of state involvement with respect to the activity under challenge. MOOSE LODGE NO. 107 VS. IRVIS, 407 U.S. 163 (1972); DOE VS. BELLIN MEMORIAL HOSPITAL, 479 F.2d 756 (7th Circuit 1973).[1]

The evidence in this case is conclusive on one point and that is that Orange County, whatever else might be said about its contacts with the hospital operation, had absolutely nothing to do with medical policy and particularly with such policy as it pertained to the performance of abortions within the hospital. As to this subject, the county was completely neutral, and in fact under

---

[1]The "state action" concept has developed for the most part in cases involving racial discrimination where it has been given a quite broad application. COOPER VS. AARON, 358 U.S. 1 (1958); BURTON VS. WILMINGTON PARKING AUTHORITY, 365 U.S. 715 (1961); EVANS VS. NEWTON, 382 U.S. 296 (1966). Outside the areas of invidious discrimination, the concept has been applied more narrowly. MOOSE LODGE NO. 107 VS. IRVIS, 407 U.S. 163 (1972); JACKSON VS. METROPOLITAN EDISON COMPANY, ... U.S. ....., 42 L.Ed. 477 (1974). There are two reasons for this. The discrimination cases reflect an intense concern of the courts to implement national policy with respect to eliminating all vestiges of unequal treatment on account of race alone. In this area, the state has a duty not merely to stand aside but to affirmatively act to eliminate such discrimination in areas committed to its responsibility. GREEN VS. COUNTY SCHOOL BOARD, 391 U.S. 430 (1968); SWANN VS. BOARD OF EDUCATION, 402 U.S. 1 (1971). Secondly, the challenged conduct in cases not involving racial discrimination generally is motivated by values which are themselves entitled to constitutional protection. JACKSON VS. METROPOLITAN EDISON COMPANY, supra. See DOE VS. BOLTON, 410 U.S. 179 at 197.

its lease had no right to influence or otherwise interfere with any medical policy established by the hospital. The situation is identical to that existing in DOE VS. BELLIN MEMORIAL HOSPITAL, supra, wherein upholding a hospital rule identical to that of Respondents, the Court stated:

> "There is no evidence * * * * that any condition related to the performance or non-performance of abortions was imposed upon the hospital. Unlike the fact situation in Simkins vs. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1953), * * * * this record does not reflect any governmental involvement in the very activity which is being challenged."
>
> * * * *
>
> "Nor do we believe that the implementation of defendant's own rules relating to abortions is action 'under color of' state law within the meaning of Sec. 1983. The State of Wisconsin is not a beneficiary of those rules and can not be characterized as a 'joint participant' in their adoption or enforcement. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-725, 81 S. Ct. 856, 6 L.Ed.2d 45. There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits. Insofar as action of the State of Wisconsin or its agents is disclosed by the record, the State has exercised no influence whatsoever on the decision of the defendants which plaintiffs challenge in this litigation." (479 F.2d 761).

Nor does there exist here the symbiotic relationship between the county and the hospital found existing in BURTON VS. WILMINGTON PARKING AUTHORITY, supra. Although the land upon which the hospital was built was furnished by the county and construction funds obtained from either the county or the federal government, the hospital is not part of a governmental project nor does the financial success of any government operation depend upon the medical policy pursued by the hospital. The

hospital is a self-sustaining medical facility with an operating budget of approximately $4.4 million. None of these funds are supplied by any government entity (Record, Volume 2, Pages 42, 78).

The record in this case does not reflect any governmental involvement in the abortion policy of the hospital, nor are Orange County and the hospital so intertwined as to make them joint participants within the meaning of BURTON VS. WILMINGTON PARKING AUTHORITY, supra. For these reasons, the application for certiorari should be denied.

III.

The individual Respondents were correctly dismissed by the District Court since there was no diversity of citizenship between the Plaintiff and all of the Defendants.

As noted above, the Petitioner jointed numerous individual members of the hospital staff and Board of Directors as party defendants, asserting that they were individually liable for damages because of their willful and malicious conduct in seeking to punish the Petitioner for his views. The court dismissed this aspect of the case on the grounds that insofar as the allegations pertained to hospital policy, such policy was the sole preserve of the Board of Directors, and insofar as such allegations stated a cause of action in tort, there was not the requisite diversity of citizenship to confer jurisdiction upon the Federal Court.

The hospital By-Laws make it clear that the Board of Directors had the sole policy-making power in the hospital. Although the medical staff is delegated administrative functions, all of its decisions are subject to approval by the Board of Directors and, in fact, the abortion policy at issue here, although formulated by the medical staff, was submitted to and approved by the Board of Directors. Of course it may be assumed that the recommendations

of the medical staff would be given great weight and would not be lightly disregarded, but this does not alter the fact that the responsibility for the final decision reposes not in the medical staff or the individual members thereof but in the duly elected governing Board of the hospital.

Accordingly, taking the Petitioner's allegations as true for the purposes of the Motion to Dismiss, he merely stated a cause of action for a tortious interference with an economic pursuit, a claim over which the Federal Court had no jurisdiction.

IV.

The Petitioner does not have standing to maintain this action.

Respondents accept the ruling in DOE VS. BOLTON, 410 U.S. 179 (1973) that a patient seeking an abortion in the hospital would have the necessary standing even if the pregnancy had terminated before the case was heard. Likewise, Respondents concede that a phsyician might possibly have standing to sue if he were threatened with meaningful sanctions for disobeying the rule. As the court observed in BOLTON:

> "The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions.
>
> "The physicians-appellants, therefore, assert a sufficiently direct threat of personal detriment." 410 U.S. 179, 188 (1973).

In the BOLTON case the physcians had standing to attack the statute because it was aimed at them, and they were directly threatened by it.

But here, it is important to consider that the hospital rule in question does not directly operate against Dr. Greco at all. It contains no sanctions, and none have been attempted with respect to

Dr. Greco even though he has sought admissions for elective abortions after the adoption of the rule.

The hospital rule merely operates as an admission policy whereby pregnant women desiring to use the hospital facilities are prohibited from doing so if the purpose is to obtain a non-therapeutic abortion.

On facts closely similar to these, the court in COREY VS. CITY OF DALLAS, 492 F.2d 496 (5th Cir. 1974) held that an owner of a massage parlor lacked standing to attack an ordinance making unlawful the administration of a massage to any member of the opposite sex.

Noting that as a general proposition a person may not assert constitutional rights of third parties, TILESTON VS. ULLMAN, 318 U.S. 44 (1943), the court proceeded to determine whether the massage parlor owner fell within the exception to the rule which provides that a litigant may assert the rights of third parties if it would be difficult or impossible for such third parties to raise those rights themselves. Cf. BARROWS VS. JACKSON, 346 U.S. 249 (1953), PIERCE VS. SOCIETY OF SISTERS, 268 U.S. 510 (1925). The court held that the exception did not apply because the ordinance in question was aimed at those who administered massages, and if these persons were ever prosecuted under the statute, they would be free to assert their own equal protection claims. Since the statute was not aimed at the owner, as he could not be prosecuted unless he participated in the prohibited conduct, he had no standing to assert the rights of other persons who might be affected by the statute.

In the instant case, it is clear that the hospital rule can only be applied with respect to patients seeking non-therapeutic abortions. As the record here demonstrates, it has been the patients seeking

admittance that have felt the impact of the rule, and whatever effect the rule has on Dr. Greco is derivative of that application.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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By _____
Attorneys for Respondents

PROOF OF SERVICE

I, L. W. Anderson, attorney for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copy of the foregoing Brief in Opposition to the granting of a Petition for Writ of Certiorari on Mr. James R. Weddington, 709 W. 14th Street, Austin, Texas, 78701, by mailing three copies thereof, postage prepaid and properly addressed on this 17 day of October, 1975.

_____

APPENDIX A

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

APPENDIX B

STATE OF TEXAS }
COUNTY OF ORANGE }

BEFORE ME, the undersigned authority, on this day personally appeared Willie C. Magness, known to me to be the person whose name is subscribed hereto, and after being by me duly sworn did depose and say that he is the administrator of the Orange Memorial Hospital and is duly authorized to make this affidavit; that pursuant to the by-laws of the Orange Memorial Hospital Corporation, an administrative hearing was held pursuant to which on February 21, 1975, the staff privileges of Dr. John C. Greco were not renewed by said hospital; that Dr. John C. Greco is not now a member of the medical staff of said hospital and accordingly is not permitted to use the facilities of said hospital for the treatment of patients; that the attached Exhibit A is a true and correct list of all physicians presently enjoying staff privileges in Orange Memorial Hospital.

WILLIE C. MAGNESS
Willie C. Magness

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this the 8th day of October, 1975.

JOYCE F. WILKINSON
Notary Public,
Orange County, Texas

STAFF PHYSICIANS

EXT. #	NAME	CALL #	ADDRESS - OFFICE	OFFICE #	HOME #
283	Allen, Rollie E.	3	1307 W. Park	883-9341	886-3291
230	Barnes, J. E.	7	1005 Green	883-3579	886-8355
293	Bennett, David	27	801 W. Park	883-3752	883-3928
219	Bryant, Wm. W.	2	O.M.H.	Ext. #219	883-4056
282	Cleaves, Wilbur R.	23	1303 Park	883-1312	886-1011
285	Cloud, James P.	38	933 — 12th St.	883-8385	886-3266
303	De Bellis, Joseph	12	1309 W. Park	883-6100	886-4433
286	Eastman, Geo. L.	24	1001 W. Elm	886-3303	886-3190
	Fisette, Rod J.	34	235 Roberts, Bridge City	735-2487	883-7217
242	Griffin, O. R.	58	O.M.H.	Ext. #242	883-5823
287	Harris, M. F.	18	1118 N. 6th	883-3811	883-5376
284	Ingram, Robert A.	16	908 — 12th St.	886-2686	886-2859
203	Jones, J. B.	5	2607 Western	886-4407	735-4591
230	Kee, Robert C.	69	1005 Green	883-3579	883-4200
210	LeBlanc, Nolan J.	17	405 — 9th	886-4242	886-4922
	Merwin, Ralph C.	35	2531 Western	883-2334	883-4741
211	Pearce, H. Wynne	59	707 W. Main	883-4433	883-2536
297	Pollock, D. H.	19	803 W. Park	883-9402	886-2504
301	Pretz, E. C.	89	1406 W. Park	886-2935	886-4858
212	Stuntz, Homer C.	6	1214 — 16th	883-4796	883-8828
308	Sur, Sudha	4	306 — 10th	886-3030	886-1560
245	Watson, A. R.	57	O.M.H.	Ext. #245	883-9262
282	Williams, Howard C.	56	1303 W. Park	886-1313	886-2123
310	Young, Benjamin C.	68	Pinehurst Clinic	886-3633	886-4661

ACTIVE COURTESY STAFF

	Hale, Mary Lou	125	409 — 9th	883-4843	886-7792
289	Stuntz, Billie J.	67	1214 — 16th	883-4796	883-8828

CERTIFIED LIST OF ACTIVE MEDICAL STAFF
OF ORANGE MEMORIAL HOSPITAL CORPORATION,
ORANGE, TEXAS AS OF OCTOBER 8, 1975.

Dr. Ralph C. Merwin
Answering Service: 886-4433
Groves Hospital 962-5730

Dr. Benjamin C. Young
Answering Service: 735-2248

Dr. Barnett Page #126

STATE OF TEXAS
COUNTY OF ORANGE

JOYCE F. WILKINSON
Notary Public in and for
Orange, Orange County, Texas